IN THE MATTER OF a Board of Inquiry appointed pursuant to s.38(1) of the Human Rights Code, R.S.O. 1990, c.H.19

BETWEEN

Mr. Brian O'Neill and Mr. Bruce Coles
Complainants

and

Her Majesty The Queen in right of Ontario, the Ministry of Transportation, and Pat Jacobsen
Respondents

Date of the Complaints: January 23, 1990 and March 14,1989.

Hearing Date: August 30, 1994 in London, Ontario

Board of Inquiry: Berend Hovius

Appearances: Fiona Campbell, Counsel for the Ontario Human Rights Commission

Dennis Brown, Q.C., Robert E. Charney, and Ariane Siegel, Counsel for the Respondents

Brian O'Neill, on his own behalf

Bruce Coles, on his own behalf

DECISION

Background

By letter dated January 6, 1993, I was appointed by the Ontario Minister of Citizenship as a Board of Inquiry to hear and decide the complaints of Brian O'Neill and Bruce Coles. Bruce Coles alleged discrimination in the provision of services on the basis of sexual orientation, marital status and family status by Her Majesty The Queen in right of Ontario and the Ministry of Transportation. Brian O'Neill alleged discrimination on the basis of sexual orientation in the provision of services by the Ministry of Transportation and Pat Jacobsen, the Deputy Minister. The hearing was commenced by Conference Call on February 3, 1993 and a number of days in July, 1993 were selected for the hearing of the evidence and argument. The matter was adjourned indefinitely in late June, 1993 at the request of the parties to permit them to pursue settlement discussions. In May, 1994 I was informed that there had been no settlement and the Commission requested a resumption of the hearing.

The hearing took place on August 30, 1994. The parties submitted an Agreed Statement of Facts. As explained below, counsel for the respondents argued in favour of the merits of the complaint. Indeed, the only contentious issue of any consequence at the hearing was the nature of the order that I should make.

Facts

The facts are fairly straightforward and not in dispute. Brian O'Neill is a gay man who has been living with Alan Steen since 1985. Mr. O'Neill and Mr. Steen share financial resources and expenses. They have joint bank accounts and joint credit cards. Both of their names have been on the lease for their apartment since 1986. They jointly own a car and both are listed on the car insurance and on the insurance for the apartment's

contents. Mr. O'Neill is covered under Mr. Steen's employee benefit plan at York University. Mr. O'Neill and Mr. Steen have been publicly representing themselves as a couple to friends, family and colleagues since their relationship began.

On September 14, 1989 Mr. O'Neill attended at the Licence Office of the Ministry of Transportation and indicated that he would like to add Mr. Steen's name to the registered ownership of his motor vehicle. Mr. O'Neill was told that he would have to get a Safety Standards Certificate (a certificate, hereinafter) at the cost of approximately $50.00 if he wanted to add Mr. Steen's name. He was also advised that he would not require a certificate if he were adding the name of a spouse from a marriage or a common-law relationship. Mr. O'Neill then obtained a certificate at the cost of $50.00 and added Mr. Steen's name to the ownership of his motor vehicle. He subsequently filed the complaint that is the subject of these proceedings.

Mr. Coles' complaint arises out of similar facts. He is a gay man who cohabitated with Mr. Ivan Coles from 1979 until the latter's death on June 22, 1994. Prior to the death of Ivan Cole, they shared expenses and financial resources. They also publicly represented themselves as a couple to family, friends and colleagues.

On October 19, 1988, Mr. Bruce Coles contacted a Ministry of Transportation's Licence Office to enquire about transferring the ownership of a motor vehicle from Mr. Ivan Coles' name to his own name as he was the primary driver. Prior to contacting this office, Bruce Coles had consulted a Driver's Handbook that stated that a certificate was not required when the ownership of a vehicle was transferred to a spouse directly by the owner or through a deceased owner's estate. When Bruce Coles inquired whether he would be exempt, he was told that the exemption applied to opposite-sex couples only.

The actions of the Ministry of Transportation were based on s.2 of Ontario Regulation 744/82 adopted under the Highway Traffic Act. S.2(1) specifies that the applicant for a permit for a used motor vehicle must submit a certificate. Clause 2(2)(b) waives this requirement where the applicant is the spouse of the registered owner of the vehicle. At the time of the events giving rise to the complaints, s.2(5) stated: "For the purposes of clause (2) (b)" spouse" has the meaning as defined in the Family Law Act." The Family Law Act, in fact, defines "spouse" in two different ways. The general definition, which applies to all Parts of the Act, is set out in s.1(1):

> "spouse" means either of a man and woman who,
> (a) are married to each other, or
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

However, there is an extended definition of "spouse" set out in s.29 for the purposes of Part III, "Support Obligations":

> "spouse" means a spouse as defined in subsection 1(1), and in addition includes either of a man and woman who are not married to each other and have cohabitated,
> (a) continuously for a period of not less than three years, or
> (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

It appears that the Ministry of Transportation adopted this second definition in applying the spousal exemption in s.2 of the regulation at the time of the events leading to this complaint. It might be noted that s.2(5) was amended in 1992 to stipulate clearly that the definition in Part III of the Family Law Act governed.

In their Agreed Statement of Facts, the parties stated that the reason for the requirement of a certificate under s.2 of the regulation is "to ensure that the vehicle, which might have been subject to significant wear and tear and possible damage, meets basic prescribed safety standards" thereby promoting "highway safety" and providing "a basic level of protection to the purchaser". They suggested the following bases for the spousal

exemption which was introduced in 1973:

> (a) The presumption that the family automobile was not unlike the family home and thereby the joint property of both spouses; and
>
> (b) The vehicle would remain within the same household and would be transporting members of the same household. In addition, the purchaser would be familiar with the vehicle and with its driving history and the vehicle would be unlikely to leave its geographical location as a result of the transfer.

Liability under the Human Rights Code

(i) The Position of the Human Rights Commission

The Commission argued that the respondents' actions constituted unequal treatment in the provision of services contrary to s.1 of the Ontario Human Rights Code. The limitation of the spousal exemption to married and cohabitating opposite-sex couples was said to constitute discrimination on the basis of sexual orientation. The fact that this limitation was authorized or even required by s.2 of Regulation 744/82 was of no legal consequence since s.47(2) of the Code gave primacy to the Code. That subsection provides:

> Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

(ii) The Position of the Respondents

Counsel for the respondents acknowledged that the Ministry of Transportation's actions seemed "at first impression" to discriminate on the basis of sexual orientation. Paragraph 16 of their Statement of Fact and Law reads:

> Clauses 2 (2) (b) and 2(5) [of] Regulation 628 [previously 744/82] provide that opposite-sex couples in a conjugal relationship as defined are entitled to a permit without submission of a safety standards certificate. This is denied to same-sex couples in a similar relationship. The only difference between these two sets of couples is their sexual orientation. It would therefore seem at first impression that the Regulation discriminates on the basis of sexual orientation, and therefore infringes s.1 of the Code.

However, the respondents contended that the term "sexual

orientation", which is not defined in the Code, must be interpreted in light of the Code's definitions of "marital status" and "spouse". "Marital status" is defined in s.10(1) to mean "...the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite-sex in a conjugal relationship outside marriage." "Spouse" is defined in the same subsection as "the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage." The respondents argued that these definitions indicated the Legislature's intent to limit the term "sexual orientation" as a prohibited ground of discrimination. Differential treatment of persons simply because they have the capacity, or perceived capacity, to be sexually attracted to persons of the same sex is prohibited but differential treatment between opposite-sex conjugal relationships and same-sex conjugal relationships is not. In other words, protection against discrimination based on sexual orientation is limited to the extent that it does not protect same-sex conjugal relationships.

The respondents argued that this interpretation of the term "sexual orientation" in the Code was adopted by a majority of the Board of Inquiry in Leshner v. Ontario (1992), 16 C.H.R.R. D/184 and endorsed by the Ontario Divisional Court in Ontario Blue Cross v. Clinton (unreported, May 3, 1994).

Accordingly, the respondents argued that the Ministry of Transportation had not discriminated against the complainants on the basis of sexual orientation contrary to the Code when it refused to extend the spousal exemption to same-sex relationships. Surprisingly, however, the respondents then argued vigorously that the fact that the Ontario Human Rights Code permitted differential treatment between same-sex and opposite-sex couples constituted discrimination on the basis of sexual orientation contrary to s.15(1) of the Canadian Charter of Rights and Freedoms. Obviously, this would require giving the

term "sexual orientation" a broader meaning for the purposes of the Charter than that advocated by the respondents in the interpretation of the Code. The appropriate remedy, according to the respondents, was to "read out" the words "of the opposite sex" in the definitions of "marital status" and "spouse" in s.10(1) of the Code. This would then pave the way for a re-interpretation of the term "sexual orientation" in s.1 of the Code so that "protection given against discrimination based on sexual orientation can be given its ordinary meaning without the constraints of the internal limitations in the Code." The ultimate result would be that the respondents had, indeed, violated the Code and the complaints would be upheld on their merits.

In their Statement of Fact and Law, the respondents suggested that they had an obligation in these circumstances to present arguments both in favour and against the constitutional validity of the current definitions in the Code:

> The role of the Attorney-General as counsel for the Respondents is to assist the Board of Inquiry by putting before it authorities and argument which will enable it to come to its own conclusion on the issues. Because no party in this case is arguing in support of the legislation, these submissions will address both sides of the constitutional issue and include the arguments that can be made in favour of the constitutional validity of the legislation, and the reasons why they should be rejected.

I have three comments on the peculiar position of the respondents regarding the merits of the complaint. First, the attempt to present both sides of the Charter argument did not work well. It was all too obvious that the respondents' counsel wanted a ruling that a narrow interpretation of the Code would result in a Charter violation. Contrary arguments were put forward in a half-hearted manner, only to be vigorously attacked by the same speaker. Second, the respondents inappropriately attempted to turn the adversarial procedures set up under the Code to resolve concrete disputes into a reference case on the constitutionality of a law. At the hearing there was no dispute between the parties regarding the ultimate merits of the

complaint. Both sides argued that I should find that the respondents violated s.1 of the Code. In response to a question, Mr.Charney was unable to explain what practical differences would follow if I adopted his approach rather than the one suggested by the Commission. Ultimately, this is a case in which the respondents conceded liability under the Code. Indeed, they went further. They provided me with an alternative basis for upholding the complaint, one which was not relied upon by the Commission.

Third, I was left with the distinct impression that the entire process was being used to attempt to divert responsibility for the extension of certain benefits to same-sex couples from the Government of Ontario to a Board of Inquiry under the Human Rights Code. Counsel for the Attorney-General of Ontario, appearing on behalf of Her Majesty the Queen in right of Ontario and the Ministry of Transportation, argued strongly that the spousal exemption at issue in this case resulted in a violation of the Ontario Human Rights Code, as properly interpreted. Indeed, it follows logically from the analysis put forward by the respondents that s.2(5) of the regulations governing the spousal exemption violates the Canadian Charter of Rights and Freedoms. If this is the view of the Government of Ontario, then it should promulgate a new regulation removing this infringement of both the Code and the Charter. Counsel for the Attorney-General hinted that this was the ultimate goal but that my "guidance" was required before this would occur. The fact that my "guidance" would be granted after a hearing in which all parties agreed on the merits of the complaint would presumably be conveniently forgotten.

(iii) The Leshner and Clinton Decisions:

As explained above, the parties agreed that ultimately I should find that the complainants' right under s.1 of the Code to equal treatment in the provision of services without

discrimination on the basis of sexual orientation was infringed by the respondents. However, the respondents argued that this result could only be achieved by first using the Charter to "read down" the definitions of 'marital status" and "spouse" in the Code. In particular, they stated that the Ontario Divisional Court decision in Ontario Blue Cross v. Clinton (unreported, May 3, 1994) which endorsed the reasoning adopted by a majority of the Board of Inquiry in Leshner v. Ontario (1992), 16 C.H.R.R. D/184 precluded me from adopting any other approach.

In Leshner, a Crown employee applied for spousal benefits for his same-sex partner. By the time the case was decided, the Ontario public service had extended coverage under employee benefit plans to same-sex couples. However, the Government of Ontario indicated that it could not extend survivor benefits under the employee pension plans to same-sex partners of plan members because of restrictions in Canada's Income Tax Act. Despite the Government's decision to extend coverage for health and dental benefits to same-sex partners, the Board of Inquiry addressed the merits of the complaint, giving particular attention to the outstanding issue of survival benefits under the pension plan. The Board wrote two concurring judgements. The majority judgement found that a policy to exclude same-sex conjugal partners from benefits under employee benefit plans was permissable under the Ontario Human Rights Code, absent any Charter considerations, but ultimately unlawful when measured against s.15 of the Charter. The concurring minority judgement found that the policy violated the Human Rights Code itself as it constituted discrimination on the basis of sexual orientation and was not covered by the exempting provisions of s.25(2). Since it was the majority's reasoning that was later endorsed by the Ontario Divisional Court in Clinton, it must be analyzed.

The Leshner majority first asked itself whether there had been any prima facie infringement of a right under the Code. After finding as a fact that Mr. Leshner had been denied the

right to receive employment benefits on behalf of his male partner, the majority concluded (at p. D/176, para. 73):

> At first impression, then, there is a denial of equal treatment in employment benefits because of sexual orientation and a breach of s.5(1) of the Code, and it would follow that the Code should offer the complainant redress. However, this brings us to a discussion of s.25(2) of the Code, and its impact.

The relevant sections read as follows:

> S.25(1) The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employee, that makes a distinction, preference or exclusion on a prohibited ground of discrimination.
>
> (2) The right under section 5 to equal treatment with respect to employment without discrimination because of age, sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the Employment Standards Act and the regulations thereunder.

The majority in Leshner then went on to conclude that s.25(2) provided the respondents with a defence to the complaint. It held that s.25(2), when read in conjunction with the definitions of "marital status" and "spouse" in s.10(1) of the Code, permitted the denial of benefits under employee benefit plans to an employee's same-sex partner.

The respondents argued before me that the majority decision in Leshner did not depend on the application of s.25(2), but rather that it stood for the proposition that "protection against discrimination based on sexual orientation is limited to the extent that it does not protect same-sex conjugal relationships." In response to a question, counsel for the respondents suggested that the majority 's interpretation of the Code in Leshner would have been the same even if s.25(2) did not exist. Although the majority's reasoning in Leshner is not free of ambiguity, I do

not accept this view. The centrality of s.25(2) to the majority's view is illustrated by the following passage (at D/199, para. 100 to para. 103):

> The definition of "marital status" and "spouse" in s.10(1) of the Code do not give any identifiable "status" to a person in a same-sex relationship within the context of the words "marital status" and "spouse." These definitions do not, of themselves, impact adversely upon Mr. Leshner in providing the respondent with a defence. Rather, that is provided by the same mirrored and limiting definitions found in the overall provincial legislative scheme for pension plans and insured benefits through s.34(2) of the Employment Standards Act and s. 1(i), 1(m), 3(1)(b), and 9(c) of Reg. 282, as amended, thereunder, s.1 of the Public Service Superannuation Act and s. 1 of Schedule 1 of the Public Service Pension Act which are the operative discriminating provisions. This discrimination by provincial legislation would be inconsistent with s.5(1) of the Code in allowing discrimination against a gay employee in terms of survivor benefits (and hence, struck down by s. 47(2) of the Code), but for s. 25(2) of the Code which expressly exempts discrimination because of "marital status" with respect to a pension plan or contract of group insurance that complies with the Employment Standards Act and the regulations thereunder.[emphasis added]

There is no question that the pension plan under review in this hearing, and the contract of group insurance of Great West in force before January 1, 1991, comply with the regulations under the Employment Stardards Act. The entire scheme discriminates against gay and lesbian employees in a same-sex conjugal relationship. The scheme is inconsistent with the values set forth in the Preamble to the Code and in its intent in giving effect to these values through prohibiting discrimination because of sexual orientation in employment. But s.25(2) condones such discrimination because of "marital status." In effect, it condones discrimination which refuses to give equal "status" to the same-sex conjugal relationship for employee pension and group insurance benefits.[emphasis added]

> Issue 6: Does the Code permit or authorize discrimination in employment benefits, in this case pension benefits, against employees who are in same-sex conjugal relationship?

On the basis of [the] foregoing analysis, the answer to this issue would have to be "yes." Clearly, Mr. Leshner is being discriminated against in that his same-sex conjugal relationship is not being given equivalent status to an opposite-sex conjugal relationship for employment benefit plan purposes. In this sense, the underlying factor is

> discrimination because of sexual orientation. But it is discrimination condoned by s. 25(2) of the Code. In effect, s. 25(2) allows discrimination in employment benefits on the basis of whether or not the employee has a "status" derived from having a partner in a heterosexual conjugal relationship arising from a legal or, so-called, common-law marriage.[emphasis added]
>
> It is the nature of his "marital status" that is the operative factor in the discrimination of Mr. Leshner in the instant case. But for s. 25(2) of the Code, such discrimination would be prohibited by s. 5(1). [emphasis added]

In Clinton v. Ontario Blue Cross (No. 2) (1993), 18 C.H.R.R. D/377, the Board of Inquiry ruled that Ontario Blue Cross discriminated against Elizabeth Clinton because of her sexual orientation by refusing to provide benefits under Clinton's employee benefit plan to her same-sex partner. The Board declined to follow the majority's reasoning in Leshner and concluded that s. 25(2) did not permit the differential treatment of same-sex couples. The essence of the Board's reasoning was contained in paragraph 30 (at D/381):

> The respondent has here argued that s. 25(2) must be read to authorize, or "legalize" a denial of employee benefits to same-sex couples. With respect, I do not agree. In my view, s. 25(2) provides a defence to allegations that an employee benefit plan violates the Code because it discriminates on the basis of "age, sex, marital status or family status" only. Where the allegation alleges discrimination on the basis of sexual orientation, the legislature has provided no exclusion in s 25(2).

Ontario Blue Cross appealed and the Ontario Divisional Court allowed the appeal. In a handwritten endorsement, the court stated:

> In our opinion the tribunal erred in concluding that the appellant violated the provisions of the OHRC in denying certain benefits to the respondent Clinton because she had been discriminated against on the basis of sexual orientation as prohibited by the OHRC.
>
> The correct interpretation of the relevant provisions of the OHRC ,namely s.5(1), s. 10(1), insofar as it defines "marital status" and "spouse", and s. 25, together with related provisions of the Employment Standards Act, is that found in the majority decision in Leshner v. Ontario #2 1992

16 CHRR D/184 Ontario Board of Inquiry.
The court declined to permit counsel for the respondents to raise any Charter argument "because of the absence of adequate notice to the AGs whether or not s. 109 of CJA applies."

In light of the Divisional Court decision, it is now clear that a failure to extend spousal benefits under certain employee benefit plans to an employee's same-sex partner is not a violation of the Code. However, this result appears to derive from the wording of s. 25 of the Code and related provisions of the Employment Standards Act.

(iv)Conclusion

Freed from the constraints imposed by their interpretation of Leshner and Clinton, the respondents would no doubt have conceded that there had been an infringement of s.1 and s.9 of the Code, even apart from Charter considerations. After all, they argued forcefully in the context of their Charter analysis that "excluding people in same-sex relationships from benefits accorded to opposite-sex couples excludes them because they are gay men or lesbians, and not on any other basis. It thus amounts to discrimination based on sexual orientation..." To buttress this view, both counsel for the respondents and Commission's counsel referred to the comments of Lamer C.J.C. in Canada (Attorney-General) v. Mossop (1993), 100 D.L.R.(4th) 658 (S.C.C.).

In Mossop, a collective agreement provided for up to four days leave upon the death of a member of an employee's immediate family. The members of an employee's "immediate family" specified in the agreement included relatives of a " common law spouse".The latter term was defined to mean only persons of the opposite sex. An individual in a long-term homosexual relationship was denied paid leave to attend the funeral of his partner's father. The employer offered him a day of special leave, which he declined. A tribunal under the Canadian Human

Rights Act found that the employer and union had violated the Act by discriminating on the basis of family status. An application for judicial review was granted and the decision was set aside. An appeal to the Supreme Court of Canada was dismissed. Speaking for the majority, Lamer C.J.C. stated (at 672):

> I find it hard to see how Parliament can be deemed to have intended to cover the situation now before the court in the C.H.R.A. when we know that it specifically excluded sexual orientation from the list of prohibited grounds of discrimination contained in the Act. In the case at bar, Mr.Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the C.H.R.A. the prohibition which Parliament specifically decided not to include in the Act, namely, the prohibition of discrimination on the basis of sexual orientation.

On the same page, Chief Justice Lamer concluded that Marceau J.A. had correctly identified the nature of the alleged discrimination in the case when the latter stated:

> It is sexual orientation which has led the complainant to enter with Popert into a "familial relationship" (to use the expression of the expert sociologist) and sexual orientation, therefore, which has precluded the recognition of his family status with regard to his lover and that man's father. So in [the] final analysis, sexual orientation is really the ground of discrimination involved.

In light of all the foregoing, I find that the respondents infringed Bruce Coles' and Brian O'Neill's right to equal treatment with respect to services without discrimination because of sexual orientation contrary to s.1 and s.9 of the Ontario Human Rights Code. By virtue of s.47(2) of the Code, it is no defence that the Ministry of Transportation's action was authorized or even required by s.2 of Regulation 744/82. This finding renders unnecessary any analysis of the Charter issues raised by the respondents.

Remedy:

Commission counsel requested that I order the Ministry of Transportation to pay Brian O'Neill $50.00 to reimburse him for the cost of obtaining a certificate and to pay $500.00 each to

Brian O'Neill and Bruce Coles as general damages for injury to their dignity and self-respect and for the loss of their right to freedom from discrimination. Neither my jurisdiction to make these orders nor the reasonableness of the suggested amounts was contested by the respondents' counsel.

Commission counsel also suggested that I declare that s.2(5) of Regulation 628/90 made under the Highway Traffic Act was contrary to the Ontario Human Rights Code. I agree with the respondents' counsel that I do not have jurisdiction to make a general declaration that a law conflicts with either the Ontario Human Rights Code or the Charter. See Re Schewchuck and Ricard (1986), 28 D.L.R. (4th) 429 at 439 (B.C.C.A.) and Canada (Attorney General) v. Druken (1988), 9 C.H.R.R. D/5339 (Fed. C.A.)

Finally, Commission counsel asked that I order the Ministry of Transportation to cease its practice of automatically excluding all same-sex couples from the spousal exemption to the requirement for a safety standards certificate and to extend that exemption to such couples on the same basis as opposite-sex common law couples. She suggested that I had the power to make such an order under s. 41(1) (a) of the Code. It permits a Board of Inquiry to "direct the party [found to have infringed the Code] to do anything that, in the opinion of the Board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices".[emphasis added] She noted that the Federal Court of Appeal in Druken upheld a decision of a Canadian Human Rights Tribunal under the Canadian Human Rights Act ordering the Canada Employment and Immigration Commission to cease the discriminatory practice of applying certain sections of the Unemployment Insurance Act. In that case, paragraph 41(2)(a) of the Canadian Human Rights Act authorized the tribunal to order that measures be taken "in order to prevent the same or a similar practice from occurring in the future". Mahoney J., for the court, observed (at D/5367 and

D/5368):

> That is not intended only to prevent repetition of the discriminatory practice vis- a- vis the particular complainant; it is intended to prevent its repetition at all by the person found to have engaged in it. Thus the order that the CEIC cease applying paragraphs 3(2)(c) and 4(3)(d) of the U.I.Act and 14(a) of the U.I.Regulations appears entirely apt.

Counsel for the respondents argued that s.41(1) of the Code did not permit the requested order and he urged me not to follow Druken. He asked me simply to direct the Ministry of Transportation to apply the exemption in clause 2(2)(b) of the regulation to the complainants. Anything more, it was said, would amount to an amendment of the regulation.

I accept Commission counsel's argument that I have jurisdiction under s.41(1) of the Code to order the Ministry of Transportation to comply with the Code in its future provision of services,including the application of the spousal exemption from the requirement for a safety standards certificate. I share some of the respondents' counsel's concerns regarding the potential breadth and practical implication of the exercise of this type of jurisdiction by an appointed board. No doubt there will be many cases in which boards will refrain from exercising this power. The wording of s.41(1)(a), particularly the phrase "in the opinion of the board", indicates that the Board of Inquiry has a discretion not to exercise this power. In this case, however, it would be inappropriate, in light of the respondents' arguments on the merits of the complaint, to fail to deal with future practices. Such a failure would leave the Ministry free to continue to deny the spousal exemption to others in the same position as the complainants, even though the Ministry argued strenuously at the hearing that such a denial violated the Code and conflicted with the Charter. Presumably, other complaints would then reach Boards of Inquiry under the Code and counsel for the Ministry would once again appear to argue that the complaints should be upheld!

Order

This Board of Inquiry, having found that, as conceded by all parties, the complainants' right to equal treatment with respect to services without discrimination because of sexual orientation was infringed by the Ontario Ministry of Transportation contrary to s.1 and s.9 of the Human Rights Code, orders the following:

(1) The Ontario Ministry of Transportation pay forthwith to Brian O'Neill:

(a) as compensation for the cost of obtaining a certificate, the sum of $50.00; and

(b) as general damages, the sum of $500.00.

(2) The Ontario Ministry of Transportation pay forthwith to Bruce Coles, as general damages, the sum of $500.00.

(3) The Ontario Ministry of Transportation cease its practice of automatically excluding all same-sex couples from the spousal exemption to the requirement for a safety standards certificate and extend that exemption to such couples on the same terms as opposite-sex couples who cohabit conjugally outside of marriage.

October 13, 1994

B. Hovius

Berend Hovius
Board of Inquiry